IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

JAMES F. KIRK, *Petitioner*,

vs.

P. J. SQUIER, Warden, United States Penitentiary, McNeil Island, Wash.

No.....

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit

To: The Honorable Harlan Fiske Stone, Chief Justice, and to the Associate Justices of the United States Supreme Court:

James F. Kirk respectfully prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit affirming a judgment of the District Court for the Western District of Washington, Southern Division, sustaining a demurrer to petitioner's petition for a Writ of Habeas Corpus.

SUMMARY STATEMENT OF MATTER INVOLVED

Petitioner asserts that his confinement by the warden of the United States Penitentiary at McNeil Island, Washington, under a sentence of the United States District Court for the Southern District of California, Central Division, is unlawful because (a) under its own terms, the sentence has not yet com-

menced, (b) the sentence is so indefinite as to term as to be void, and (c) the sentence, if construed to be presently effective, is in violation of law and void.

The questions here involved arose on respondent's demurrer (R. 17) to petitioner's petition for a Writ of Habeas Corpus (R. 2-15), the demurrer admitting the facts pleaded.

On May 15, 1934, petitioner, after indictment and plea of guilty, was sentenced by the superior court of the State of California for Los Angeles County to life imprisonment with possibility of parole. Pursuant to that sentence, petitioner was immediately confined in the state penitentiary (R. 3-4; 8-9).

On the same date, petitioner was indicted in the United States District Court for the Southern District of California, Central Division (R. 4-5), later brought from the state penitentiary on Habeas Corpus Ad Prosequendum (R. 20-24) to the District Court, tried and found guilty. On May 31, 1934, he was sentenced by the said District Court to 17½ years on each of the first and second counts and 2 years on the third count, the sentences to run consecutively and not concurrently, and *to commence to run upon the release of appellant from the imprisonment he was then serving under the judgment and sentence of the State of California*, hereinbefore referred to (R. 10-11). Petitioner was immediately returned to confinement in the state penitentiary.

On November 16, 1942, the Board of Prison Terms and Paroles of the State of California paroled appellant into the custody of the United States authorities for confinement under the Federal sentence (R. 11-

12). This parole was conditioned that, should the Federal authorities fail to incarcerate him at any time during the period of his parole (that is, during his lifetime):

> "Said prisoner shall immediately report to the state parole officer of the State of California * * * it being understood that should the parole officer deem it proper to return the said parolee to prison to await the further order of the board that he shall be and is hereby authorized so to do.
>
> "Be it further provided that all such parolees shall be required to fully comply with all of the laws, rules, and regulations governing parole should they be released from custody prior to the expiration of their parole period." (R. 12)

Pursuant to this parole, petitioner was taken to the United States Penitentiary on McNeil Island on December 11, 1942, and is now confined there.

Petitioner, on August 30, 1944, filed a petition for Habeas Corpus based on the foregoing facts (R. 2-15); respondent interposed a demurrer (R. 17); and on September 16, 1944, the District Judge entered an order sustaining the demurrer and remanding petitioner to the custody of respondent (R. 18-19). No written opinion was filed by the District Court.

The Circuit Court of Appeals for the Ninth Circuit affirmed the decision of the District Court, rendered a written opinion (R. 33-47) and entered judgment June 1, 1945 (R. 47). Petition for Rehearing was denied July 24, 1945 (R. 48). *Kirk v. Squier*, 150 F. (2d) 3. The court held that the sentence of the Federal District Court was intended to commence upon petitioner's release from physical confinement in the peni-

tentiary (R. 35-36) because imprisonment under parole is "fictional" (R. 45-46).

STATEMENT OF JURISDICTION

1. The original proceeding was a Petition for a Writ of Habeas Corpus brought pursuant to 28 U.S.C.A. 451-462, under which the District Court had jurisdiction. Appeal was taken to the Circuit Court of Appeals as allowed by 28 U.S.C.A. 463-466 and Rule 81(a)(2) Federal Rules of Civil Procedure; 28 U.S.C.A. foll. 723(c). This Court has jurisdiction pursuant to 28 U.S.C.A. 347(a).

2. The following case is believed to sustain the jurisdiction of this court:

Ex parte Richard Quirin, 317 U.S. 18, 87 L. ed. 3, 10.

3. This Petition is timely under the provisions of 28 U.S.C.A. §350. The decision of the Circuit Court of Appeals was announced and its judgment entered June 1, 1945 (R. 47). Petition for Rehearing was filed within the time allowed by Rule 25 of that Court, as extended by the Court, on July 19, 1945, and denied July 24, 1945 (R. 48). This Petition is docketed prior to October 24, 1945.

QUESTIONS PRESENTED

1. Where a Federal sentence is conditioned to commence upon the release of the person sentenced from imprisonment under an identified, prior state sentence, does the Federal sentence become operative upon the prisoner's release from the state penitentiary on parole?

2. Is a prisoner released on parole only "fictionally" imprisoned?

3. Is a Federal sentence, conditioned to commence upon the release of the person sentenced from imprisonment for life "with possibility of parole" under a previous, valid state sentence, so indefinite as to its time of commencement as to be void?

4. Where state statutes provide that the Parole Board, upon granting any parole, may impose on the parole such conditions as it may deem proper, but that prisoners on parole shall remain under the legal custody of the Board and shall be subject at any time to be taken back within the enclosure of the prison, may a Federal court validly make its sentence commence upon the release of a state prisoner on parole?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

This matter is, of course, of great importance to the petitioner individually. The effect of the decision of the Circuit Court is to deprive him of any possibility of actual parole, designed to rehabilitate him, from the sovereignty which first obtained jurisdiction and custody of his person.

In re Wright, 51 F. Supp. 639, 642.

The Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

The Circuit Court of Appeals held, in substance, that a Federal District Court had the power to sentence a prisoner, already under a life sentence to a state, and make its sentence commence, by taking

physical custody of the prisoner, as of the date of the parole of the prisoner by the state. This Court has held:

> "that the court which first takes the subject matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy to attain which it assumed control before the other court shall attempt to take it for its purpose." *Ponzi v. Fessenden*, 258 U.S. 254, 66 L. ed. 607.

Parole, being designed to restore a prisoner to a useful position in society, is part of the remedy of the jurisdiction which first assumed control of the prisoner. For the Federal court to imprison a state parolee is to deprive that state of a portion of its remedy. The specific question as to whether a Federal court can, by making its sentence effective upon the parole of a state prisoner, deprive the state of a portion of its remedy has not been passed on by this Court. Since all jurisdictions, including the United States, have some form of parole law, the problem will often arise and presents an extremely important phase of Federal procedure which should be determined by this Court.

The exact point has been passed upon only once and that by the Ninth Circuit in the case of *Johnston v. Wright*, 137 F.(2d) 914, in which the Court held that a Federal sentence conditioned to commence upon the expiration of a previous state, life sentence did not become operative upon parole of the prisoner by the state. It is true that the Circuit Court in the instant case attempted to distinguish it from the *Wright* case but the distinction is without a difference.

If one jurisdiction has the power to take into custody a prisoner on parole from another jurisdiction, without its consent, then the whole value of parole law is lost. Until this Court has made an authoritative pronouncement on this subject, the parole boards of the various jurisdictions will trade prisoners back and forth with the ultimate result that the prisoners may be confined indefinitely although sentenced to specific terms. This was the result of the *Wright* case. *U. S. v. Wright*, 56 F. Supp. 489.

As above stated, Wright had been released by the state authorities into the custody of the Federal authorities and imprisoned in a Federal prison although his Federal sentence did not commence until the expiration of his state sentences. He served over three years in the Federal penitentiary when the Circuit Court of Appeals granted him a Writ of Habeas Corpus and he was returned to the state authorities. Later he received a pardon from the state authorities and the Federal authorities again apprehended him to commence service on his Federal sentence. The Federal court indicated its willingness and *inability* to allow him credit on his Federal sentence for the time served prior to its commencement date.

Carried to its logical extreme, the situation can be contemplated where a prisoner sentenced by two different jurisdictions may, by a judicious set of transfers from one authority to the other, be deprived of his liberty for life although his sentences may be for much less. That, we assert, is the real problem; a problem which should be determined by this Court.

Corollary to the above proposition is the question as to whether a Federal sentence, which is intended to take effect upon the release of a state prisoner on state parole, is certain and definite enough to be valid. This court does not appear to have passed on that question and again, in view of the universal use of parole and the numerous cases where prisoners on parole are convicted of other crimes, the question is of paramount importance.

The petitioner's Federal sentence here is uncertain because its commencement is based on two future discretionary acts of a parole board — (a) petitioner's release on parole, entirely discretionary under the California law, and (b) the transfer of petitioner's custody by the California Parole Board to respondent, an act both discretionary and unauthorized (Appendix 1-3). The California law requires that the Board of Paroles retain the custody of the paroled prisoner. No consent has been given by the state to the transfer of his custody nor is there any authority which allows it. A case directly in point is *In re Wright*, 51 F. Supp. 639, 642, *supra*.

The Circuit Court has decided a Federal question in a way in conflict with applicable decisions of this Court.

In arriving at its decision that petitioner's Federal sentence was intended to and did commence upon his release from confinement in the California penitentiary under parole rather than at the time of his complete release from all state custody, the Circuit Court has adopted two false premises: (a) that release from the penitentiary on parole is "release from imprisonment" or, stated alternatively, that "release

from imprisonment" means "release from confinement within the prison walls," and (b) that the State of California legally gave its consent to the transfer of petitioners custody from the state to the Federal Government.

The first premise is in conflict with an applicable decision of this Court, of other Circuit Courts, the decisions of the State of California and, indeed, the universal weight of authority.

The second premise is in conflict with the decisions and statutes of the State of Cailfornia.

This Court in *Anderson v. Corall*, 263 U.S. 193, 68 L. ed. 247, at 254, in discussing the Federal Parole Law, which is substantially identical to the California laws, said:

> "The parole authorized by the statute does not suspend service or operate to shorten the term. While on parole, the convict is bound to remain in the legal custody and under the control of the Warden until the expiration of the term, less allowance, if any, for good conduct. *While this is an amelioration of punishment, it is, in legal effect, imprisonment.*" (Italics ours)

The parole authorized by the California law does not suspend service or operate to shorten the term and the convict is bound to remain in the legal custody and under the control of the Board of Paroles (Appendix 1-2). The Circuit Court of Appeals in the instant case held, without citation of a single sustaining authority, that such imprisonment was fictional. Such a holding is directly contrary to the holding of this Court.

If, as the Circuit Court held, the words "release from imprisonment" can, under certain circumstances, mean release from confinement, a ruling contrary to its statement in the case of *Johnston v. Wright*, 137 F.(2d) 914, *supra*, the language of the sentence is ambiguous. Such ambiguity should be resolved in favor of the petitioner. *Hogan v. Hill.* 9 F. Supp. 333. This is certainly the intention of *U. S. v. Daugherty*, 269 U.S. 360, 70 L. ed. 309, which case the Circuit Court misconstrued in connection with the instant case (R. 39). In that case, this Court admonished the trial courts

> "to require the use of meticulously precise language in all judgment entries. Especial care is essential where sentences for crimes are imposed."

Had the Federal trial court here intended to make its sentence effective upon release from confinement rather than imprisonment, it would and should have said so.

The Circuit Court has decided an important question of local law in a way in conflict with applicable local decisions.

In holding that a prisoner released on parole under California law is not still imprisoned, the Court's decision is in conflict with the California statutes (Appendix 1-3) and the following California decisions:

In the Matter of Stanton, 169 Cal. 607, 147 Pac. 264;

In re Sanders, 47 Cal. App. 368, 190 Pac. 647;

Ex parte Heckman, 90 Cal. App. 700, 266 Pac. 585 (certiorari denied, Supreme Court of California);

Ex parte Forbes, 108 Cal. App. 683, 292 Pac. 142;

Ex parte Taylor, 216 Cal. 113, 13 P.(2d) 906;

Ex parte Daniels, 106 Cal. App. 43, 288 Pac. 1109;

Ex parte Albori, 218 Cal. 54, 21 P.(2d) 423.

In holding that, under California Parole Statutes, the Board of Paroles is entitled to release the custody of the prisoner to another jurisdiction, the court has decided in conflict with and by ignoring Deering's Penal Code of California (1941) § 3056 (Appendix 1, R. 34, note 1; R. 42, 45, 46). The California cases above cited support the conclusion that the State of California, or its Board of Paroles, has not and can not give its consent to the transfer of custody of a prisoner on parole from California to another jurisdiction. Actual or tacit consent by a parole board to an act illegal in itself or not within the powers of the board can have no effect.

Federal Trade Commission v. Raladam Co., 283 U.S. 643, 649, 75 L. ed. 1324, 1330.

The Circuit Court has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals.

In holding that the release of a prisoner on parole does not constitute real imprisonment but is merely fictional, the Circuit Court has decided in conflict with the decisions of the following courts of other Circuits:

United States ex rel. Carapa v. Curran (C.C.A. 2) 297 Fed. 946, 950, 36 A.L.R. 877, 880;

Stockton v. Massey (C.C.A. 4) 34 F.(2d) 96;

United States ex rel. Rowe v. Nicholson (C.C.A. 4) 78 F.(2d) 468;

United States ex rel. Nicholson v. Dillard (C.C.A. 4) 102 F.(2d) 94;

Morgan v. Aderhold (C.C.A. 5) 73 F.(2d) 171;

Grant v. Guernsey (C.C.A. 10) 63 F.(2d) 163;

and of its own decisions:

Nagle v. Lim Foon (C.C.A. 9) 48 F.(2d) 51;

Johnston v. Wright (C.C.A. 9) 137 F.(2d) 914, *supra.*

Perhaps, in passing upon the questions raised by this petition for Writ of Habeas Corpus, the Circuit Court was motivated partly by the fact that petitioner was sentenced by one jurisdiction to life and by another to 37 years and that release on habeas corpus here would not free him from all imprisonment. Yet, the points involved go far beyond the precise predicament of the petitioner; a decision by this court will set at rest one of the always recurring conflicts between state and Federal sovereignties.

We respectfully submit that issues of interest and magnitude such as these should be reviewed by this Court.

LOREN GRINSTEAD,
Counsel for Petitioner.

Of Counsel:
ARTHUR GRUNBAUM,

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I. OPINION OF COURT BELOW

The only written opinion rendered in this matter was that of the Circuit Court of Appeals for the Ninth Circuit which appears in the Record at pages 33-37, inclusive, and is reported in 150 F.(2d) 3 (Advance Sheets of September 3, 1945).

II. JURISDICTION

The statutes, rule, and cases sustaining the jurisdiction of this Court are set forth in the Petition for Writ of Certiorari, page 4, and, for brevity, are adopted and incorporated herein.

III. STATEMENT OF CASE

The essential facts are set forth in the Petition for Writ of Certiorari, pages 1-14. We adopt that statement herein for brevity.

IV. ASSIGNMENT OF ERRORS

The Circuit Court of Appeals erred in the judgment on which review is sought herein:

1. In holding that the Federal sentence of petitioner, conditioned to commence upon the release of petitioner from his previous confinement under a life sentence in the California State Penitentiary, became operative upon petitioner's release from the state penitentiary on parole.

2. In holding that a prisoner released on parole under California law is no longer imprisoned or, alternatively, that he is only "fictionally" imprisoned, such ruling being in conflict with the decisions of this Court, of other Circuit Courts, and the universal weight of authority.

3. In holding that the sentence of the Federal court conditioned to commence upon the release of the petitioner from previous life imprisonment by the State of California was intended to be operative upon his release from confinement.

4. In holding that, so construed, the sentence was not so indefinite as to its time of commencement as to be void.

5. In holding, contrary to the statutes of the State of California, that petitioner could lawfully be released by the California State Parole Board into the custody of the respondent.

6. In affirming the judgment of the District Court.

V. ARGUMENT

Summary of Argument

The "Questions Presented" and "Reasons Relied on for the Allowance of the Writ" in the Petition and the foregoing "Assignment of Errors" are most conveniently presented by argument of three points.

Point A

The petitioner is illegally held under a Federal sentence which, by its own terms, has not yet commenced. The Federal sentence becomes effective upon petitioner's release from imprisonment by the State of California. Release on parole is not release from imprisonment but a continuation thereof. The Circuit Court in holding to the contrary is in conflict with decisions of this Court, the Circuit Courts, and the Supreme Court of California. Since petitioner is still imprisoned under the state sentence, his Federal sentence has not yet commenced and his detention by respondent is unlawful. Although not followed in this case, this is the rule of the Ninth Circuit. This Court has not passed upon this important question of Federal law. It should be settled by this Court (Questions 1, 2, Petition 4-5; Assignment of Errors 1, 2, 3, 6).

Point B

The Federal sentence under which petitioner is held, if construed to commence upon his release on parole from the state penitentiary, is in violation of law and void. In view of the settled California law that a prisoner released on parole is still imprisoned and the California statute (Deering's Penal Code, 1941, §3056) requiring the Parole Board, after parole, to retain the custody of the prisoner, the State of Cali-

fornia has not consented and can not legally consent to the transfer of the custody of the petitioner to the respondent. The Federal authorities have no power to take the custody of a state prisoner under prior state imprisonment without the consent of the state. If the Federal sentence does not clearly mean that it becomes effective only on release of petitioner from all state imprisonment, it is ambiguous and must be construed in favor of the prisoner. A construction of the sentence which causes it to allow an illegal transfer of petitioner's custody from one jurisdiction to the other must result in the sentence being declared void. In holding to the contrary, the Circuit Court has decided in conflict with the decisions of this Court. In any event, further delineation of the conflicting rights of two sovereignties should be made by this Court (Question 4, Petition 5; Assignment of Errors 5, 6).

Point C

Petitioner's Federal sentence, if construed to commence on his release from confinement, is so indefinite as to time of commencement as to be void. So construed, the sentence can not become effective unless the California State Parole Board paroles petitioner and also into federal custody. Parole itself, under California law, is entirely discretionary with a board not controlled by the court rendering the sentence. Parole of the prisoner into the custody of another jurisdiction is both discretionary and unauthorized. The fact that the Parole Board actually did take these steps makes the sentence no less uncertain. For the purpose of determining certainty, the sentence must be viewed as of the date it was rendered. This Court has not

passed on this question which is an important question of Federal law (Question 3, Petition 5; Assignment of Errors 4, 6).

ARGUMENT IN SUPPORT OF POINTS

Argument in Support of Point A

The Federal sentence, under which petitioner asserts he is at present illegally confined, was conditioned to commence upon petitioner's release from imprisonment under a prior state, life sentence which the state commenced to enforce before the rendition of the Federal sentence. The District Judge rendering the sentence, taking judicial notice of the decisions of this Court that it is not within the power of the United States to assume control of a prisoner already controlled by state jurisdiction (*Ponzi v. Fessenden*, 258 U.S. 254, 66 L. ed. 607, and taking judicial notice that, under the laws and decisions of California hereinafter referred to, a release on parole is not a release from imprisonment, must have intended to cause its sentence to commence only when the state had exhausted its remedy against petitioner. The language of the Federal sentence is clear; the only question is, has petitioner's imprisonment ended when he is released on parole from confinement in the penitentiary?

A parole is not a release from imprisonment. The language of the parole itself (R.12) indicates this. Petitioner's parole was to the custody of the United States authorities. If the United States authorities did not take him, then he was to report back to the state parole officer and, in addition, was required to fully comply with all the laws, rules and regulations gov-

erning parole, under California law, if released from Federal custody. Is this release from imprisonment?

The statutes of the State of California which govern the granting of paroles, are set forth in the appendix hereto (Appendix 1-3). They provide in substance that the Parole Board shall have power to allow prisoners imprisoned in the state prisons to go upon parole outside the prison walls and enclosures, subject to such rules and regulations as the Board may provide. Prisoners on parole remain under the legal custody of the Board and are subject at any time to be taken back within the enclosure of the prison. If a paroled prisoner leaves the state without permission of the Board, he shall be held as an escaped prisoner and arrested as such. The Board has full power to suspend, cancel or revoke any parole without notice and to order the "prisoner upon parole" to be returned to prison. The Governor has like power to revoke paroles without notice and his order of revocation is sufficient warrant to any peace officer to retake and return said "prisoner to the state prison."

Can it be fairly said that these parole statutes contemplate that a "prisoner on parole" is released from imprisonment?

The California courts have expressly and emphatically held that a parolee is not released from imprisonment.

> "During the time petitioner was outside the prison walls upon parole, and at the time he is alleged to have violated his parole, the petitioner was under the jurisdiction of the board of prison directors and was constructively a prisoner of the state. *Matter of Stanton*, 169 Cal. 607, 147 P.

264; *In re Sanders*, 47 Cal. App. 368, 190 P. 647." *Ex parte Heckman*, 90 Cal. App. 700, 266 Pac. 585, 587 (Cert. den. Sup. Ct. Cal.).

"The authorities are quite numerous to the effect that a prisoner serving a sentence of imprisonment in a state prison is, in contemplation of law, a prisoner therein as well when at work outside, under the surveillance of prison guards, as when confined within its walls, and also that a prisoner, while outside the prison walls upon parole, is likewise within the custody and control of the state prison, but need not be cited for the reason that section 1168 of the Penal Code, as amended (St. 1929, P. 1934), reads as follows: 'Prisoners on parole shall remain under the legal custody of the * * * board * * * and shall be subject at any time to be taken back within the enclosure of the prison'." *Ex parte Forbes*, 108 Cal. App. 683, 292 Pac. 142, 143 (1930).

To the same effect:

Ex parte Taylor, 216 Cal. 113, 13 P.(2d) 906, 907;

Ex parte Daniels, 106 Cal. App. 43, 288 Pac. 1109;

Ex parte Albori, 218 Cal. 54, 21 P.(2d) 422.

In *Ex parte Stanton*, 169 Cal. 607, 147 Pac. 264, the Penal Code, §1588, provided:

"Every convict who shall have no infraction of the rules and regulations of the prison"

shall have credit against his sentence. Petitioner, while on parole, violated the parole rules and claimed this was not an infraction of the prison rules. In denying this contention, the court said:

"The parole law, expressly declares that a

> prisoner out on parole is nevertheless 'in the legal custody and under the control of the * * * board * * *.' In legal contemplation, therefore, he remains a prisoner, although out on parole. * * * The rules which the board may make for his conduct while outside are, as we understand the statute, 'the rules and regulations of the prison' * * *" (p. 265)

To the same effect:

Re Sanders, 47 Cal. App. 368, 190 Pac. 647.

In holding (R. 45-46) that imprisonment on parole is fictional, it is obvious that the Circuit Court in this case has rendered a decision in conflict with applicable local decisions. Since the question as to whether petitioner is still imprisoned, under the California sentence, is a matter of California law the Circuit Court was bound to apply that local law. It has failed to do so.

But, assuming that the definition of "imprisonment" is a matter of general law, the Circuit Court is in conflict with the following decisions of this court and of other Circuit Courts:

> "The parole authorized by the statute does not suspend service or operate to shorten the term. While on parole the convict is bound to remain in the legal custody and under the control of the warden until the expiration of the term, less allowance, if any, for good conduct. While *this is an amelioration of punishment, it is, in legal effect, imprisonment.*" *Anderson v. Corall*, 263 U.S. 193, 68 L. ed. 247, at 254 (Italics ours).

> "It must be borne in mind that the legal philosophy underlying the parole law is not a release of the prisoner from all disciplinary restraint

but is rather merely 'an extension of the prison walls'; and the prisoner while on parole remains 'in the legal custody and under the control of' the Parole Board, 18 U.S.C.A. §716; *Anderson v. Corall*, 263 U.S. 193, 196, 44 S. Ct. 43, 68 L. ed. 247; *Morgan v. Aderhold* (C.C.A. 5), 73 F.(2d) 171, 172; *Stockton v. Massey*, 34 F.(2d) 96 (C.C.A. 4)." *United States ex rel. Rowe v. Nicholson* (C.C.A. 4) 78 F.(2d) 468, 469.

"The term 'imprisonment' imports any restraint placed upon one contrary to his wishes and amounting to a physical detention of his person. It is not necessary that he should be restrained behind prison bars." *United States ex rel. Carapa v. Curran*, 297 Fed. 946, 950, 36 A. L. R. 877, at 880 (C.C.A. 2).

"The status of the prisoner while under conditional release was that of a prisoner on parole, 18 U. S. C. A. 716b. While this was an amelioration of punishment, it was imprisonment in legal effect, *Anderson v. Corall*, 263 U.S. 193, 44 S. Ct. 43, 45, 68 L. ed. 247. He was bound to remain in the legal custody and under the control of the warden of the penitentiary; and the issuance of the warrant for his arrest was but the assertion of the authority over him vested by law in the Board of Parole because of his imprisonment." *United States ex rel. Nicholson v. Dillard*, 102 F.(2d) 94, at 96 (C.C.A. 4).

and the following decisions of other state courts:

"The parolee, although at large while on parole, is a prisoner no less than a prisoner physically confined. He is enduring compulsory expiation of an offense. He is under daily personal restraint. He is at all times answerable to prison system officials for his conduct. Such officials

have authority to greatly circumscribe his freedom of choice and action. Being amenable to prison system rules and authority and under immediate restraints is he not, to all practical purposes, in custody? See *Carpenter v. Lord*, 88 Or. 128, 171 Pac. 577, 579, L.R.A. 1918D 674, 677.

* * *

"Parole, therefore, is not an act of amnesty or forgiveness—as some suppose. It does not put an end to sentence legally imposed. Rather, it is a continuation of sentence. The parole plan proceeds, in theory at least, upon the salutary principle that as the prison sentence of the individual must eventually terminate, the ends of society as a whole, as well as of the individual prisoner, will be better served by providing the prisoner a transition period for adjustment from the completely artificial life in a penal institution under continuous physical restraint and free from economic and social pressures to the untrammeled life of a free individual in a highly competitive society." *Sellers v. Bridges*, 153 Fla. 586, 15 So.(2d) 293, 294, 295.

"A parole does not operate to wipe out the judgment of conviction but merely suspends its operation by remitting, for the time being, the confinement and hard labor, until the end of the term, or until an unconditional pardon is granted. Until one of these events occurs, the offender is subject, upon a violation of any of the conditions, to be taken into custody and be held to suffer actual imprisonment as though the parole had not been granted." *In re Sutton*, 50 Mont. 88, 145 Pac. 6, 8, Ann. Cas. 1917A, 1223.

Com. ex rel. Banks v. Cain, 345 Pa. 581, 28 A.(2d) 897, 143 A.L.R. 1473.

The Circuit Court's attempted distinguishment of its previous cases of *In re Wright*, 51 F. Supp. 639, and *Johnston v. Wright*, 137 F.(2d) 914, under which, we assert, petitioner should be released, is without foundation. By selecting a portion only of the California statutes for review (R. 34, Note 1) and omitting any reference to §3056 (Appendix 1), the Circuit court attempts to demonstrate the State of California had properly authorized the consent of the California Parole Board to the transfer of petitioner's custody to respondent. But when the parole statutes are considered as a whole, and with particular reference to the fact that the Parole Board is *required* to retain custody of the prisoner while on parole, the force of the Circuit Court's position is destroyed.

We submit that since petitioner's Federal sentence has not commenced, because he is still imprisoned by the State of California, the retention of his custody by the respondent is void.

Johnston v. Wright, 137 F.(2d) 914, *supra.*

No decision of this Court on this important proposition has been found and this Court should, for the benefit of all Circuit Courts, adopt the principle of the above case.

Argument in Support of Point B

The Circuit Court in construing petitioner's sentence to be effective upon his release from confinement rather than imprisonment said:

> "The Federal court was well aware that Kirk was serving a life sentence in state prison at the time the federal sentence was imposed, and

clearly understood that the federal sentence (in the absence of commutation of sentence or a pardon of Kirk through state executive clemency) would be utterly futile, if it was to commence when Kirk's state sentence ended, since this sentence would end only upon his death. Therefore, the Federal court clearly intended to make the federal sentence 'commence to run' if and when Kirk was released from physical confinement in state prison by parole, commutation or pardon." (R. 35-36)

In view of the rule laid down by this Court in the case of *Ponzi v. Fessenden*, 258 U.S. 254, 66 L. ed. 607, *supra*, it is impossible to agree with the Circuit Court's evaluation of the District Court's intention at the time of sentencing. Clearly, the District Court knew that it could not take jurisdiction of petitioner until the State of California had exhausted its remedy. The fact that the Federal sentence might, therefore, never become effective has no bearing. Suppose petitioner had been sentenced by the state to be executed within a month and that the Federal sentence were conditioned to commence immediately. Obviously, unless the Federal authorities took immediate possession of the custody of petitioner, their sentence could never become effective. Yet, could it be held that, for this reason, a seizure of petitioner's person would be proper?

That one jurisdiction has no such power over the prisoner of another is clearly set forth in *Ponzi v. Fessenden*, 258 U.S. 254, 66 L. ed. 607, *supra*, and the following cases:

Grant v. Guernsey, 63 F.(2d) 163;

Carpenter v. Lord, 88 Or. 128, 171 Pac. 577, L. R. A. 1918D 674, and cases cited;

In re Jennings (C.C.E.D. Mo) 118 Fed. 479.

We have already pointed out that, under California law, no authority has been given to the California Parole Board to terminate any sentence or to surrender the custody of a state prisoner to another jurisdiction. To the contrary, the sole power to grant reprieves, pardons, and commutations of sentence is, by the Constitution of California, Article VII, lodged solely in the Governor of that state. Since the state has not authorized its consent, nor legally consented, to the course of procedure taken herein, the question is more than one between two sovereignties. It is a defect in the authority of respondent to hold petitioner, which petitioner may personally attack.

U.S. ex rel. Strewl v. Warden (D.C. N.Y.) 21 F. Supp. 502;

Johnston v. Wright, 137 F.(2d) 914, at 917, *supra.*

If the words "release from imprisonment" can mean exactly what they say or, to the contrary, as the Circuit Court held, can mean release from confinement in the penitentiary, then, clearly, they are ambiguous. Such ambiguity should be resolved in favor of the prisoner's liberty.

Hogan v. Hill (D.C. Pa.) 9 F. Supp. 333.

This, we submit, is also the meaning of the case of *United States v. Daugherty*, 269 U.S. 360, 70 L. ed. 309. The Circuit Court did not so construe it (R. 39-40).

And, if, as heretofore argued, the sentence as con-

strued by the Circuit Court is beyond the power of the Federal Court, it is void. If there are two constructions, one of which makes the sentence void, the sentence will be void.

Re Nielsen, 131 U.S. 176, 33 L. ed. 118;

Re Mills, 135 U.S. 263, 34 L. ed 107;

Wagner v. United States, 3 F.(2d) 864.

The Circuit Court has misapplied the rules laid down by the above Supreme Court cases and, for this reason, this case should be reviewed.

Argument in Support of Point C

The California statutes (Appendix 1-3) make parole purely discretionary with the parole officers but there is no treaty between the United States and California that California prisoners in the custody of its officers can or will be surrendered to the United States, nor any law of California requiring or allowing such surrender. We submit that, read as of the date of its rendition, the Federal sentence is void for uncertainty because the time of its commencement must necessarily depend upon the discretion of a board, the members of which may not even be the same as when the sentence was rendered.

Judge Denman of the Circuit Court of Appeals in *In re Wright*, 51 F. Supp. 639, 642, where a Federal sentence of a prisoner previously sentenced by the state to life was conditioned to commence upon the expiration of the state sentence, forcefully set forth the reasons why, if the Federal sentence were construed to mean upon expiration of physical confine-

ment, the sentence there would be void for uncertainty. He said:

"The Warden's contention does violence to the plain language of the sentence. However, were it correct, the federal sentence would be void for uncertainty. The validity of the sentence must be determined by the facts existent at the time it was made. There was not then, and is not now, any treaty between the United States and Illinois that Illinois prisoners in the custody of its officials would be surrendered on demand of the United States. There was not then, nor is there now, any law of Illinois requiring such surrender on demand of the United States. The most that a federal district court, looking forward from the date of its sentence, could hope for was that at some time an agreement might be arrived at between the two sovereignties for the surrender of the Illinois prisoner to the United States Marshal.

"Looking forward from the day of sentencing, nothing could be more uncertain to the federal court than that sometime during Wright's Illinois sentence, possibly for life, the following contingencies would happen: (a) that he would be released from the penitentiary on parole, and (b) that prior to that date an agreement would be made between the two sovereignties whereby Illinois would surrender its right to Wright's custody during parole and turn him over to the United States. Of course, the federal sentence could not have its beginning predicated upon the expectancy that the United States would violate the state's custody and seize Wright while on parole without the state's consent. * * *.

"It is no fanciful conjecture to any one familiar with the long prevalent views of those in-

terested in the reform of persons convicted of crime, that the Illinois Department of Public Welfare, in office at the time of release of any prisoner on parole, might insist that the benevolent purposes of the Act would be served best by his continuance under the Department's reforming supervision, rather than by his surrender to another sovereignty for incarceration in its penitentiary. Such a board well could consider that when its reform attempts were successful, the reformed man would be in a position to seek executive clemency from the other sovereignty.

"That a board would be less likely so to regard Wright, with his several convictions, does not make certain that Illinois, nine years later, would agree to his surrender to the United States. The litigation of this circuit for the last decade shows there is no measuring rod to determine what may or may not be done by the administrative bodies in the ardent pursuit of social reforms. The afterwisdom of the fact that there happened to be a board which surrendered Wright, does not make the federal sentence any more certain when given.

"Since the federal sentence ties itself to the indeterminate sentence and parole provision of the law of Illinois, the Warden's claimed construction of the beginning of the federal sentence would have to read 'upon the termination of the imprisonment portion of the Illinois sentence *if the Illinois authorities will then surrender their custody and give up the prisoner to the United States.*' Since, as seen, there is no certainty of such surrender, the federal sentences so construed would be void."

All of the factors present in the *Wright* case are present in this case and the same conclusion must in-

evitably follow. This Court has not passed upon a similar question, and the character of such sentences as definite or indefinite should be settled by it.

The construction by the Circuit Court of this sentence as valid, and the action of the Federal authorities in taking custody of the person of petitioner can have only one effect, namely, to deprive the petitioner of any privilege of parole to which he might otherwise be entitled from the jurisdiction which first took custody. If, however, parole laws designed to rehabilitate prisoners are to be given any effect, the Circuit Court's judgment should be reversed. In this matter, this court not only has the opportunity of passing on several points of Federal procedure which we consider of importance but has an opportunity to establish the parole laws on a firmer footing. The result of the decision as rendered is that jurisdictions may trade prisoners back and forth at will without any authority or warrant in law to the end that prisoners remain such indefinitely without possibility of being restored to society.

For these reasons, we respectfully submit that this court should grant certiorari herein.

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APPENDIX

Deering's Penal Code of California (1941):

§3001: As used in this chapter the word "board" shall mean the Board of Prison Terms and Paroles.

§3040: The board shall have the power to allow prisoners imprisoned in the state prisons to go upon parole outside the prison walls and enclosures. The board may parole prisoners in the State prisons to camps for paroled prisoners established under Chapter 5, Article 5, Title 1, Part 3 of this Code.

§3046: No prisoner imprisoned under a life sentence may be paroled until he has served at least seven calendar years.

§3052: The board shall have power to establish and enforce rules and regulations under which prisoners in state prisons may be allowed to go upon parole outside the prison buildings and inclosures when eligible for parole.

§3053: The board upon granting any parole to any prisoner may also impose on the parole such conditions as it may deem proper, and shall impose as a condition of the parole, that all or a portion of his credits earned, or to be earned, may be forfeited by the order of the State Board of Prison Directors in the event that such prisoner shall break his parole or violate any law of this state or rule or regulation of the prison, or of the State Board of Prison Directors, or of the Board of Prison terms and Paroles, or any of the conditions of his parole.

§3056: Prisoners on parole shall remain under the legal custody of the State Board of Prison Directors

and shall be subject at any time to be taken back within the inclosure of the prison.

§3059: If any paroled prisoner shall leave the state without permission of the board he shall be held as an escaped prisoner and arrested as such.

§3060: The board shall have full power to suspend, cancel, or revoke any parole without notice, and to order returned to prison any prisoner upon parole. The written order of the chairman of the board shall be a sufficient warrant for any peace or prison officer to return to actual custody any conditionally released or paroled prisoner.

§3061: It is hereby made the duty of all peace officers to execute any such order in like manner as ordinary criminal process.

§3062: The Governor of the state shall have like power to revoke the parole of any prisoner. The written authority of the Governor shall likewise be sufficient to authorize any peace officer to retake and return said prisoner to the State prison. His written order revoking the parole shall have the same force and effect and be executed in like manner as the order of the chairman of the board.

§3063: No parole shall be suspended or revoked without cause, which cause must be stated in the order suspending or revoking the parole.

§3064: From and after the suspension or revocation of the parole of any prisoner and until his return to custody he shall be deemed an escape and fugitive from justice and no part of the time during which he is an escape and fugitive from justice shall be part of his term.

§3065: The provisions of this article are to apply to all prisoners now serving sentence in the state prisons, to the end that at all times the same provisions relating to sentence, imprisonments and paroles of prisoners shall apply to all the inmates thereof.

NOTE: The above sections of the Penal Code are present codification of the law in effect at the time of the original sentence of petitioner. Sections 3046, 3052, 3053, 3056, and 3059 to 3063 are a codification of the original law found in Statutes of California, 1913, Ch. 591, P. 1048. Section 3001 was originally enacted as Statutes, 1941, Ch. 106, Sec. 15, but this merely transferred the duties of the previous Board to the present one. Section 3040 was originally enacted as Statutes, 1931, Ch. 487, Sec. 2, P. 1062. Sections 3064 and 3065 were enacted at Statutes, 1941, Ch. 106, Sec. 15, but are expressly made retroactive.